

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
PLAINTIFF,) CASE NO. 3:15-CR-00358-SAE
) 3:16-CR-00222-SAE
)
vs.) JANUARY 6, 2017
YAHYA FAROOQ MOHAMMAD, ET AL.,)
) 3:00 P.M.
DEFENDANTS.)
_____)

TRANSCRIPT OF **TELEPHONE STATUS CONFERENCE** PROCEEDINGS
BEFORE HONORABLE EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFF:

CARTER M. STEWART

United States Attorney

By: Matthew W. Shepherd

Christos N. Georgalis

David C. Smith

Gregory R. Gonzalez

Assistant United States Attorneys

FOR THE DEFENDANT YAHYA FAROOQ MOHAMMAD:

By: Thomas A. Durkin, Esq.

Robin V. Waters, Esq.

FOR THE DEFENDANT IBRAHIM ZUBAIR MOHAMMAD:

By: David Lee Klucas, Esq.

FOR THE DEFENDANT ASIF AHMED SALIM:

By: Linda G. Moreno, Esq.

FOR THE DEFENDANT SULTANE ROOME SALIM:

By: Cherrefe A. Kadri, Esq.

Proceedings recorded by mechanical stenography,
transcript produced by computer.

DARLA J. COULTER, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER
85 MARCONI BOULEVARD
COLUMBUS, OHIO 43215

FRIDAY AFTERNOON SESSION

JANUARY 6 , 2017

- - -

The following proceeding was held in chambers with all counsel present via telephone:

THE COURT: Counsel, good afternoon. This is Judge Sargus. How are all of you?

(All counsel respond.)

THE COURT: So we're convened by phone. We are on the record. If I could impose upon you when you speak, for the benefit of the court reporter, to let us know who you are. I'm starting to recognize you by voice, but it's taking me a while.

There are a couple of matters we ought to start with, anyway, and they both have to do with the trial date that has been set. We have the '16 case first and then the '15 case after that. So let's talk, first, about the '15 -- I'm sorry, the '16 case. I have them backwards, I think.

The '16 case was first, and the '15 case was second. There has been a motion to continue both dates.

Is there any objection to either of the motions?

MR. SHEPHERD: Your Honor, this is Matt Shepherd for the government. The government does not oppose the motion to continue. Our request, however, is that we keep the '16 case going before the '15 case, but we don't oppose a continuance of both dates.

1 MS. MORENO: Your Honor, this is Linda Moreno. Happy
2 New Year to you and to every counsel on the call.

3 I wanted to indicate to the Court that because I had not
4 filed a motion to continue the '15 case, which is the case I'm
5 on with Mr. Asif Salim, that I wanted to make an oral
6 application to the Court. And I can supplement it with a
7 written motion, but I do join both Mr. Durkin and Ms. Kadri's
8 motion to continue the trial matters for all the reasons stated
9 in both motions. And I can certainly go into that further if
10 the Court feels it's necessary, but I am authorized to also
11 indicate that my client would waive any right to speedy trial
12 depending upon when the Court does set the future trial date.

13 THE COURT: All right. No, I don't think there's a
14 need to file a motion at this point. Thank you for offering,
15 but I don't think that would be necessary. So it sounds as
16 though everybody's on board.

17 MR. KLUCAS: No. I was just waiting my turn. It's
18 David Klucas on behalf of Ibrahim Mohammad. We did not ask, we
19 object, and so I just wanted to get our objection on for the
20 record.

21 THE COURT: All right. And you would like to
22 continue -- you're in the '15 case?

23 MR. KLUCAS: I should have said. I'm in the '15 case.

24 THE COURT: Right. And that would be the March trial
25 date.

1 MR. KLUCAS: That's correct.

2 THE COURT: So that's set for March 20.

3 Well, realistically, getting this done by the 20th with
4 the CIPA information probably is no longer practical. I would
5 like to stay with that date, if we could.

6 Does anybody else want to weigh in?

7 Mr. Klucas, you believe it's reasonable to still get
8 this case going by then?

9 MR. KLUCAS: I do. I do.

10 Well, I suppose -- let me rephrase that. It depends on
11 some of the decisions that are pending. I guess my position is
12 I'm not -- I'm not asking -- I wouldn't ask for a continuance
13 now not knowing how some of the unresolved things are going to
14 be resolved. And because Mr. Mohammad is locked up, I would
15 object.

16 THE COURT: All right. Anybody else want to be heard
17 on this?

18 MS. MORENO: Yes, Your Honor. This is Linda Moreno
19 again.

20 Judge, if you'll recall in our last chambers conference,
21 we did touch upon the amount of classified evidence that the
22 government has, and they indicated that they had a lot of
23 classified evidence. However, here we are in January, and we
24 don't have an indication of how and if we're going to be able
25 to use that classified evidence; whether or not the Court,

1 after hearing counsel on this issue in early February, will go
2 back to the government and order them to provide either -- to
3 provide the classified evidence or to provide a non-classified
4 summary of the evidence. We have co-counsel who are not yet
5 cleared, that's my understanding. The government -- if the
6 Court does order them to prove -- to produce some of this --
7 some of these classified materials, Mr. Shepherd will tell you,
8 Judge, that he has to go back to his stakeholders, and that
9 takes time, in order to resolve how and in which manner that
10 classified evidence is going to be produced. So I do think
11 that -- and I can only speak for Mr. Salim. I will not be
12 ready to proceed to trial. I need to go through that
13 classified evidence.

14 We also do have motions pending before Your Honor that
15 are going to affect how I proceed in Asif's defense. And we
16 also have some interesting issues raised in Mr. Durkin's motion
17 to continue, especially I'm referencing the potential Rule 15
18 depositions that would -- I think would assist my client.

19 So I do believe that we are months away before I can
20 certainly declare and announce effectively that I'm ready for
21 trial, Judge.

22 THE COURT: All right. So I'm going to start --

23 MR. DURKIN: Judge, this is Durkin on behalf of Farooq
24 Mohammad. Obviously we filed the motion, and I'll stand on
25 ours. I don't see any way that the case -- the '15 case could

1 be tried in March any more than the '16 case can be tried in
2 February for all the reasons set forth in the motion.

3 And I also want the record to reflect that I have
4 objected to the '16 case going forward first. I've already
5 done that. I didn't want my silence as acquiescence that
6 somehow I've changed my opinion. But I don't think I should be
7 forced to try the '16 case ahead of the '15 case, and I'll just
8 stand on what I filed.

9 THE COURT: Well, I'm looking at your filings. What
10 do you see as the prejudice in making the '16 case go first?

11 You know, we -- one second, Mr. Durkin. The way this
12 phone system works, if one of us is talking, the other one
13 can't hear the other one.

14 MR. DURKIN: I apologize. I'm in -- I'm in my car
15 because we were in court. I had thought we were only going to
16 be 20 minutes, and we didn't get out of court until 5 minutes
17 before the call so I apologize.

18 THE COURT: Well, that's why air traffic controllers
19 never include judges or lawyers, by the way. But --

20 MR. DURKIN: That would be a good idea. A very good
21 idea.

22 THE COURT: Right. Can you give me in a nutshell,
23 though -- I want to be sensitive if there's an issue here I'm
24 missing, but what is the prejudice that you sense if we try the
25 '16 case first.

1 MR. DURKIN: Well, hold on. I'm sorry.

2 Well, there's -- the '15 case from our standpoint up
3 until the inclusion of this '16 evidence which I still don't
4 have a handle on, I thought, frankly, was a very defensible
5 case that had a lot of significant legal issues and intent
6 issues. I think I may have stated a couple times that it's
7 really a 2339B case being shoehorned because of the lack of
8 designation of al-Awlaki into a 2339A case. And I frankly
9 think that -- I really think my client has a defense on the
10 merits of that case. And I don't know enough yet about the
11 2016 case other than, you know, essentially tape recordings
12 that we've been provided.

13 But as the government is aware, my client's wife has
14 repeatedly gotten letters from a jailhouse informant, for want
15 of a better term. I don't think I'm supposed to use his name,
16 but I think the government knows who I'm talking about. And
17 I've informed them of these letters, and these letters are
18 extremely suspicious, Judge. They talk about -- he keeps
19 insisting -- he's trying to tell the -- my client's wife, who
20 is tangentially involved in the 2016 case, that's another issue
21 I'll get to, but in these letters he's essentially saying over
22 and over again -- and these go over the period of several
23 months -- that he wants her to make sure that she knows that he
24 is not cooperating with the government and that he wants me --
25 he doesn't use my name, but he wants to speak to her husband's

1 lawyer.

2 I was precluded from doing that because this informant,
3 while he's serving a sentence on a sex offense out of -- I
4 don't know how to pronounce the name of the county, Auglous
5 (phonetic) County or something?

6 MS. MORENO: Auglaize.

7 MR. DURKIN: Auglaize County.

8 He also has a pending case in the Northern District of
9 Ohio in front of a judge whose name is escaping me. But he's
10 had a whole series of appointed lawyers, each of whom I've
11 tried to -- and each of whom I've spoken with in an attempt to
12 follow up on his request to talk to me, and the lawyers, you
13 know, quite respectfully say that they would not permit him to
14 talk to me.

15 I think I make reference in one of our more recent
16 pleadings to a recent conversation I had with his latest lawyer
17 whose name is also escaping me while I'm driving, but --

18 THE COURT: So if we go back to -- the issue is
19 whether or not there would be anything I should be aware of
20 that would really be prejudicial if we tried the '16 case
21 first.

22 Now, I mean, I get these -- I get these impediments, but
23 they would still be present whether we try it first or second,
24 though, wouldn't they?

25 MR. DURKIN: No, not necessarily. Not if he's

1 acquitted of the 2015 case. A lot of the tape recording, and
2 much of this is conversations coming from the informant's side
3 of the conversation, talks as if my client is a terrorist. And
4 it would -- it would seem to me that an acquittal in that case
5 would change the whole composition of the government's ability
6 to put in evidence in the -- it's my understanding they want to
7 put in some evidence of the 2015 case in the 2016 case.

8 THE COURT: Right. And that's not been decided yet,
9 but this would be my point: If I am accused or indicted on
10 something I'm later acquitted of but while the case is pending,
11 hypothetically, at least, I try to put a hit on a judge, the
12 fact I'm acquitted of the underlying case wouldn't change the
13 other case, would it?

14 MR. DURKIN: It certainly might change our ability to
15 defend the 2016 case because the innuendo is that this is all
16 part of a terrorist attack, of his terrorist inclinations
17 which, I believe, preposterous and contrary to a lot of the
18 evidence.

19 THE COURT: That would be if the 2015 information were
20 allowed in the 2016 case. That's what you're assuming, right?

21 MR. DURKIN: Well, yes. But I don't know how that's
22 going to be kept out of the 2016 case because there's a lot of
23 talk on the tapes of things like terrorism money, can he get
24 money together. Does his family have -- his family know he's a
25 terrorist? His family has money.

1 THE COURT: So, no, I get that. So to be blunt, let
2 me just see if I can put this into a nutshell. Your concern is
3 that the 2016 case is going to have some evidence under 404(b)
4 or otherwise that will bring in the allegations in the 2015
5 case, and your view is if the '15 case were tried first and
6 there were a favorable outcome to your client, that picture
7 would change. Is that pretty much what -- in a nutshell --

8 MR. DURKIN: Dramatically. And I think that --

9 THE COURT: So all right. I get that.

10 Now, this is the flip side. It sounds as though you and
11 the government on this particular issue are of the same mind.

12 The flip side, if we do the '15 case first, then the
13 other defendants are all going to say they definitely don't
14 want to be tried with your client. Is that what I'm hearing
15 from the other defendants?

16 MS. MORENO: Yes.

17 MR. KLUCAS: Oh, yeah.

18 MS. KADRI: We've all filed motions to that effect.

19 THE COURT: There's going to be a complication either
20 way we do this. Well, let me just do a headcount here. Of the
21 people on the phone call, who would like to have the '15 case
22 tried first without addressing whether there's a severance?
23 Let's just hold that issue. I assume the other defendants,
24 besides Mr. Farooq Mohammad, if he's severed, you don't care
25 what order they go in; would that be correct?

1 MR. KLUCAS: On behalf of Ibrahim Mohammad, that would
2 be correct.

3 MS. KADRI: This is Cherrefe. On behalf of Sultane
4 Salim, I agree with that.

5 THE COURT: If he isn't severed, you don't like that
6 situation, but does the order of trial make any difference?

7 MS. MORENO: Judge, I'm not sure because I don't know
8 what the government's position is, frankly. I take
9 responsibility for my own confusion here, but I understood that
10 they were going to bring in evidence of Mr. Mohammad in the '15
11 case if you granted their severance motion or not. I mean, if
12 the government is saying they're not going to bring in any
13 evidence of Mr. Mohammad in the '15 case, I might agree with
14 co-counsel. But I'm not sure what they want to do and what
15 they can do under whatever decision Your Honor finally does
16 make on that issue. I think it's murky, Judge. That's the
17 problem.

18 THE COURT: Let me get with the government for just a
19 second. So the government's already said you want the '15 case
20 tried first, right?

21 MR. SHEPHERD: No. We said we want the '16 case tried
22 first. We prefer to have the '16 case go first because, to
23 hopefully clarify for Ms. Moreno, we have provided notice to
24 defense counsel in this case that in the '15 case we would
25 intend to introduce as 404(b) evidence against Mr. Durkin's

1 client, evidence that is related to the '16 case, the murder
2 for hire plot, that we would introduce that as 404(b) against
3 Mr. Farooq Mohammad.

4 THE COURT: That would be a reason to do the order you
5 seek. But then in the '16 case there's going to be a certain
6 amount of evidence about the '15 case you're going to have to
7 use, first of all, just to explain the sequence of events.

8 MR. SHEPHERD: Correct, Your Honor.

9 THE COURT: How in depth -- the argument was just made
10 that you would portray him as a terrorist. You would have to
11 portray him as being in custody on charges pending in front of
12 the judge who's described in the indictment, right?

13 MR. SHEPHERD: That's correct, Your Honor. Our
14 intention in that case would be to introduce the evidence of
15 what he was charged for and who the judge was because we think
16 that's relevant to his further actions in trying to hire
17 someone to kill the judge. We would not intend to get into the
18 details of the '15 case at the '16 trial; however, I'm sure
19 that some of the communications, there's some intertwined
20 nature that I think Mr. Durkin was referring to so I don't know
21 how cleanly 100 percent clean that would be, but our intention
22 would be to limit the underlying facts of the '15 case at the
23 '16 case.

24 THE COURT: But you -- I mean, to be very precise, you
25 would want to introduce that there was a pending indictment,

1 charges were pending when this happened. Would you want to
2 introduce the nature of the charges?

3 MR. SHEPHERD: We would want to introduce what he was
4 charged for because I think that goes to his motive.

5 For example, someone who is charged for a lesser offense
6 might have less reason to want to murder the judge than someone
7 charged with a more serious offense so I think we at least
8 intend to say what he was charged with.

9 THE COURT: All right. But then, you know, that -- if
10 you're on the defense side, the jurors are being told he's been
11 charged with being a terrorist. The government would want to
12 limit that, but I would think the defense would want to have
13 some way to try to explain that away. So it sounds to me that
14 that issue would become more expansive than we would like it to
15 be, and that seems to be a bit -- more than a bit of a problem.
16 That seems to be a problem.

17 From the government's view, if we try the '15 case
18 first, just given the CIPA and so on, that's probably going to
19 cause some delay. We'll talk about that in just a moment. But
20 what's the prejudice to the government if we do the '15 case
21 first?

22 MR. SHEPHERD: I think the primary delay, I would say,
23 Your Honor, is I think it would be a more significant delay.
24 And I think we need to remember that's the case where we have a
25 victim, and the government certainly has an interest in trying

1 not to unduly delay the trial where there's a real live victim.
2 So I think that's the first thing I would mention because my
3 concern is the '16 case, the issues, I believe, are less
4 complex than in the '15 case. And I think if we have to wait
5 for the conclusion of the '15 case, the '16 case could be put
6 off for a significant period of time.

7 THE COURT: I mean, I think that's absolutely true.
8 You know, the victim -- the purported victim has the same job I
9 have so obviously I understand the circumstance, but the
10 accused is in custody.

11 MR. SHEPHERD: That's correct, Your Honor. He is in
12 custody. I also -- I guess in terms of a -- the way things
13 could resolve, I think if the '16 case is tried first and there
14 were an acquittal in the '16 case, that may make the issues of
15 what 404(b) evidence we would put in different.

16 For example, if there were an acquittal in that case,
17 we -- I mean, I guess I haven't thought this through entirely,
18 but I think it would affect what we would attempt to put in as
19 404(b) in the '15 case and may resolve some of the issues
20 related to severance and 404(b) evidentiary issues if '16 goes
21 first.

22 THE COURT: Well, you know, I don't know if you can do
23 this quickly, but to the extent you could propose in a binding
24 way what you wouldn't use in the '16 case, I would at least
25 consider that. I don't want to order a lot of extra briefing

1 in this case, but I want each side to have an opportunity.

2 By the way, the 404(b) issue, I don't want to sound like
3 a lawyer here but I am one, you know, the threshold burden of
4 proof for a proponent of 404(b) evidence is not proof beyond a
5 reasonable doubt, of course; it's actually, under the
6 Huddleston case, it's a very low threshold. It's really just
7 whether a reasonable juror could use the evidence to make a
8 conclusion referenced in 404(b). If you're going to give that
9 up, that would be a factor in whether I would do the '16 case
10 first or the '15 case. Likewise, if you're going to represent
11 in a binding way a limitation on what you would offer in the
12 '16 case, that might also have some impact on which one goes
13 first.

14 So I'm a little troubled. I don't want to make this any
15 longer than necessary but, I mean, we just know from the CIPA,
16 the '15 case is going to take longer. I'm still inclined to
17 stay with the '16 case going first, but I will give you one
18 last shot at it.

19 This is what we're going to do. We're going to go
20 forward today on the assumption the '16 case is going to go
21 first. This is subject to re-review, though. And here's how
22 we're going to do it.

23 Mr. Shepherd, do you think you can within a week make
24 representations to the parties and to the Court what you would
25 be willing to limit yourself to in the '16 case on the

1 assumption it's going first? And then Mr. Durkin will have
2 another 7 days to respond to that as to why that's not
3 sufficient if he believes that to be the case.

4 MR. SHEPHERD: And, Your Honor, just so I'm clear,
5 what -- so you would like a representation of what specific
6 evidence from the '15 case we would intend to present in the
7 '16 case?

8 THE COURT: To be perfectly blunt, the more you can
9 limit that, the more likely I am to buy your position. The
10 broader it becomes, then it seems to me it makes more sense to
11 try the '15 case first.

12 MR. SHEPHERD: Yes, Your Honor.

13 THE COURT: And, Mr. Durkin, you get the analysis
14 here. You're going to argue the other way if you think it's
15 appropriate.

16 MR. DURKIN: I understand.

17 There's a couple of other issues though, Judge, that you
18 should consider.

19 THE COURT: All right. Go ahead.

20 MR. DURKIN: One, Mr. Shepherd made reference to it, I
21 made reference to it. There is a lot of interrelated -- what
22 he called interrelated, I think that's accurate, evidence that
23 I don't think they're going to be able to separate out in the
24 '16 case. There is an awful lot of talk, most of it coming
25 from the foreman, that assumes he's a terrorist and has

1 terrorist funding and so forth and can raise money. There's
2 talk, for example, of how they could put a hit on Condoleezza
3 Rice, and I don't know, someone else who I forget now, Alberto
4 Gonzales, which I think demonstrates how preposterous much of
5 this plot may be.

6 But, in any event, there's -- there's just evidence that
7 I don't see how the government could stay away from that I
8 would just think is inherent in the context of the
9 conversation.

10 There's also two other issues that I've mentioned in my
11 pleadings. One, is that my client's wife is an absolutely
12 critical defense witness to the 2016 case. She does meet with
13 the informant -- not the informant, but an undercover agent and
14 brings him money, and there is a -- there will be a huge
15 evidentiary issue over what both of them thought the money was
16 for and the communications between my client and his wife.

17 The problem that we're still encountering, and I would
18 hope would be resolved by the time the '15 case were tried if
19 it went first, is whether or not she's going to be charged.
20 It's still my understanding that the government is still
21 conducting a grand jury investigation with respect to my
22 client's wife, which puts me in an impossible situation at the
23 moment of being able to call her at this time in the 2016 case,
24 which is another reason why my client in custody can -- is more
25 than happy to wait because we need the resolution of that case.

1 THE COURT: Well, let me ask the government, is there
2 any date by which you can tell Mr. Durkin the status of
3 Mr. Farooq Mohammad's wife as a possible target or when she
4 would be cleared, one or the other?

5 MR. SHEPHERD: Yes, Your Honor. The further
6 investigation that is ongoing will be concluded at the end of
7 this month, and we will be able to have a decision, be able to
8 communicate a decision to Mr. Durkin, I would think, by the
9 middle of next month, by the middle of February, after we
10 evaluate the final investigative steps.

11 THE COURT: All right. Well, that helps a little bit.

12 MR. DURKIN: That does. That does.

13 The other related issue, Judge, on timing is that I had
14 a sense from talking to the -- I almost slipped and said his
15 name, but the informant's lawyer whose name is Steve Hartman,
16 in the conversation I had with him -- I think I filed as an
17 exhibit to our motion to continue my letter to him of
18 November 23, and he responded in a letter to me of November 29.
19 He said that whether or when that will change, he's not -- he's
20 not sure, but he apologizes if this gets in the way of my trial
21 preparations.

22 I can certainly represent that I had the impression from
23 our conversation that his position might change on that. I
24 don't know. I mean, he didn't disclose to me why it is that he
25 wouldn't let his client talk to me at the moment, but I can

1 represent -- and I don't think he'd mind me saying that I
2 certainly had the impression that he -- that that might not be
3 a permanent -- that there was some reason, there was a temporal
4 reason that something was going on that would -- that could
5 change.

6 So that would be another reason I'd advance to wait
7 because the government seems to be suggesting that they think
8 they can try their '16 case without Workman, and I guess
9 there's some case law to that effect. But, boy, that -- you
10 know, my inability to not have Nabeela Talat, my client's wife,
11 or this -- or the informant, you know, I don't know how I can
12 defend the case without -- you know, it would be -- it would
13 just be *Mr. Toad's Wild Ride* because we would be -- we would be
14 defenseless in many ways.

15 THE COURT: Well, you're welcome to put that into your
16 memorandum in opposition once the government files the first
17 brief. But let's assume for now, and it will be subject to
18 revision when you file all this, that the '16 case is going
19 first and the '15 case is going second.

20 Let's then talk about trial dates that we can firm up
21 actually.

22 MR. DURKIN: Well, can I throw another wrench into
23 things?

24 THE COURT: What if I say no? Go ahead.

25 MR. DURKIN: You can but, you know, it will -- I'd

1 just have to file something.

2 THE COURT: Go ahead.

3 MR. DURKIN: We have a copy of your opinion on the
4 SAMs issue. I met with my client's -- well, I had somewhat of
5 a family meeting the other day on the issue of going forward in
6 light of your ruling.

7 Can I ask the government what their position would be
8 with respect to my ability to communicate with my client if I
9 refuse to sign the attorney affirmation?

10 MR. SHEPHERD: I guess in what sense? In order to
11 meet with your client, I think it's been pretty clear our
12 position has been all along that the affirmations are required,
13 and I think we've been -- the terms of the order would require
14 you to sign the affirmations before calling him as well and
15 speaking on the phone. I think we -- the marshal's service has
16 been accommodating while this litigation was pending on that
17 issue. Is your question whether you can meet with him in
18 person, whether you can continue to communicate with him on an
19 ongoing basis without signing the affirmation, or a one-time?
20 I mean, I'm just not sure what you're asking.

21 MR. DURKIN: Well, what I'm -- I've not made a final
22 decision and I want to seek my own counsel on this, but if I
23 had to make a decision today -- and I mean this respectfully,
24 Judge -- I would not sign the affirmation. You know, this --
25 and part of my basis would be this is not a case that I came

1 into where the SAMs were already there and I knew what my
2 responsibilities would have to be. And I don't want to
3 re-litigate it now. That's not what I'm trying to suggest.
4 But suffice it to say that -- and I hope you'll take this as --
5 my saying this in good faith. I don't believe that in good
6 conscience I can sign that. I think I'm correct. I don't
7 think the attorney general should be permitted to --

8 THE COURT: Well, you know, listen, I'm happy to help
9 untie knots here, but you're also talking about an order I've
10 issued. This is not a time to reargue it so you do what you
11 have to do --

12 MR. DURKIN: No, I --

13 THE COURT: No. Let me finish. You do what you have
14 to do, and I will do what I have to do. But I want to move
15 this conversation forward, okay?

16 MR. DURKIN: That's fine. I'm not trying to reargue
17 it. I'm simply -- you're asking about timing, and I'm only --

18 THE COURT: We're not going to adjust the timing for
19 someone to refuse to obey one of my orders. That's not one of
20 the things we're going to build into the timeline here.

21 Let's go back. I want to talk about dates again. The
22 '16 case, what would the government propose as a trial date?

23 MR. SHEPHERD: So, Your Honor, for the '16 case, my
24 first -- my first proposal -- again, this is Mr. Shepherd. My
25 first proposal for the '16 case, if it's sufficient time, would

1 be to move the '16 case from the February 7 date to the
2 March 20 date that's already free -- should already be free on
3 the Court's calendar. That's my first proposal.

4 THE COURT: Let me stop you there for a moment. So,
5 Mr. Durkin, subject to all the other things we've talked about,
6 and noting your objection to this going first right now, how
7 does the March 20 date look to you?

8 MR. DURKIN: Well, it's obviously available because
9 I've held it for the other case. But --

10 THE COURT: Is there something I need to know about as
11 far as discovery other than what we've already talked about?

12 MR. DURKIN: I mean, other than how I can try the case
13 without those two people being at least made available, I --
14 you know --

15 THE COURT: Well, let me ask you --

16 MR. DURKIN: I can -- I mean, I can't say that I'm
17 tied up because I'm available.

18 THE COURT: All right. So the issues you've raised
19 about the witness availability, Mr. Shepherd you're going to
20 file the first brief, what I've just ordered. You may want to
21 pick that up, too. And then, Mr. Durkin, you're going to pick
22 it up in your memorandum in opposition. Okay?

23 MR. DURKIN: That's fine. That's fine.

24 THE COURT: So for now we're going to tentatively say
25 March 20 and, of course, I'll review your filings and see if

1 that changes anything. On the assumption that the '16 case
2 goes first, let's then look at a date for the '15 case which
3 had been set for March 20. What would the government propose
4 on that case?

5 MR. SHEPHERD: Your Honor, my proposal would be to
6 schedule that case for early May.

7 THE COURT: All right. Let me just tell you, that's
8 not going to work. I assume this is going to take several
9 weeks, right?

10 MR. SHEPHERD: I would think approximately three
11 weeks, Your Honor, is our estimate.

12 THE COURT: Just one moment. I have a trial scheduled
13 in there that's going to conflict. Just a second. Give me
14 just one moment, counsel.

15 MR. SHEPHERD: And, Your Honor, I want to make clear
16 these are dates I'm throwing out I have not discussed with any
17 defense counsel so I have no idea whether this is something the
18 parties agree on or not. This is solely from the government.

19 THE COURT: We're going to go in sequence. I want to
20 get your request, I want to hear from the defendants and see
21 what they would propose and if these dates are available. So
22 hang on just one moment and we'll do all that.

23 The month of May is not going to be particularly good
24 for me. June would be better. I'm looking at maybe the 12th
25 of June?

1 MS. MORENO: Your Honor, this is Linda Moreno on
2 behalf of Asif Salim. I would say that June 12 is a good date
3 for me. I am also committed the month of May and the later
4 part of April. June would be my first available date if the
5 trial is going to go for three weeks.

6 THE COURT: All right. Let me just double check this
7 date. So we're looking at June 12. Does anybody have any
8 heartburn with that date? And, of course, I owe you a decision
9 on the issue of severance. We're at least talking about
10 several of the defendants, not necessarily Farooq Mohammad.

11 All right. So hearing no objection, then we'll set
12 June 12 --

13 MS. KADRI: Judge, this is Cherrefe. I wasn't sure if
14 you were going to call on us individually. This is Cherrefe
15 Kadri. I don't have a conflict on June 12. That date is fine.
16 I just have a problem with the -- the security clearance. I
17 have not gotten -- still haven't gotten anything from that so
18 I'm not sure how long -- how much longer that's going to take.

19 THE COURT: How far along are you?

20 MR. KLUCAS: This is David Klucas on behalf of
21 Mr. Ibrahim Mohammad. I have not received any clearance. I
22 haven't heard anything from anybody since my interviews.

23 THE COURT: But you've done the -- wait a minute. The
24 12th actually is not going to work. I can do it in late April
25 or I can do it the latter part of June.

1 MS. MORENO: Your Honor, I'm committed from late April
2 out of the country on matters so I would request late June.

3 THE COURT: How does June 26 look?

4 MR. KLUCAS: You know, on behalf of Ibrahim Mohammad,
5 I was the one that was objecting to the continuance so I'm not
6 going to give the Court a hard time about the date. Whatever
7 date the Court selects we'll make work.

8 THE COURT: All right. Anybody else have a problem
9 with the 26th of June?

10 MS. KADRI: I don't have a problem with the 26th, but
11 I'm just --

12 THE COURT: Right. You may not -- you can't prepare
13 until this is done. But you filled out the forms, you've had
14 the interviews. You just haven't gotten the response back
15 about clearance. Is that where you are?

16 MS. KADRI: Judge, what happened was -- that's
17 correct. I did contact the CISO that did the interview, the
18 investigator, and he said he's finished with it. So I
19 contacted Barbara Russell in DC, we e-mail, and her last
20 response was, you know, the investigation is done. We're just
21 waiting for a determination. We'll let you know. I got the
22 feeling, you know, don't call us, we'll call you kind of thing.
23 But that was a month-and-a-half ago maybe. And, you know, we
24 followed up right away. The investigator was very good about
25 getting things done quickly, but I haven't heard anything.

1 MR. DURKIN: For what it's worth, Judge, this is
2 Durkin. Ms. Waters, I think, applied around the same time, and
3 we were just told the other day that it's been approved. And I
4 would suggest that the squeaky wheel might get some oil if you
5 were to call there.

6 MS. KADRI: Call them again?

7 MR. DURKIN: No. I'm suggesting that if the Judge
8 called or sent a letter. I don't -- I'm pretty confident -- I
9 can't say for sure, but I -- I've worked with these people a
10 lot, as has Ms. Moreno, and I am the one that sent an e-mail
11 asking about Robin's clearance, and they got back to me right
12 away and it got taken care of. So I have a suspicion that if
13 somebody from -- you know, like if John or someone called and
14 said, you know, we understand it's complete, can this be
15 expedited, it might help.

16 THE COURT: All right. Well, why don't we do this:
17 Counsel, why don't you call the last person you've had
18 contact with and indicate to them that it's causing a concern
19 on my end and that you just wanted to get an estimate of when
20 you could expect a decision. And if you get a favorable
21 decision, that's fine. If you don't, let Mr. Olivito in my
22 office know, and then I'll take it from there.

23 MS. KADRI: Okay.

24 MR. KLUCAS: Will do.

25 MS. MORENO: Your Honor, I'm going to have an

1 additional request. I read yesterday that Mr. Trump has a
2 skiff built in the Trump Tower, and perhaps we might want to
3 use that skiff in Trump Tower for our classified evidence.

4 THE COURT: Sure. Maybe we could all meet there. We
5 may end up with one in our building, but the trouble is if you
6 are familiar with our landlord, GSA, they -- they are very rule
7 bound. It would be in my second term by the time it would be
8 done. So we'll get one, but it won't be any time soon.

9 All right. So scheduling, we now have the two trial
10 dates, at least a tentative one on the first one. With
11 regard -- but I do want to emphasize on the '15 trial, we need
12 to lock those dates in and assume that those are serious dates.
13 I've obviously left the 2016 case subject to further briefing
14 so that may not be as hard, but let's make sure that the 26th
15 date of June is a hard date. And the date of the '16 case is
16 all right, it's just subject to revision.

17 All right. While we're all on the call. Is there
18 anything else we haven't talked about?

19 MR. SHEPHERD: Your Honor, this is Mr. Shepherd. In
20 addition to the trial dates we've just set, will the Court be
21 putting out a trial order for when jury instructions and voir
22 dire and all those motions in limine are due?

23 THE COURT: Yes. You know, what I suggest we do in
24 this case, after I make the decision on your motion, we start
25 getting on the phone probably every three weeks, and we can be

1 making sure knots are untied that are out there needlessly
2 hanging. And that will be one of the topics we'll address, is
3 we have cutoff dates for motions. That's already in place.

4 But in terms of proposed jury instructions, voir dire,
5 you need to understand how I do voir dire, what my expectations
6 would be and what your expectations of me should be, all those
7 sorts of things we'll do in the course of the weeks to come.

8 MR. SHEPHERD: And, Your Honor, I was just going to
9 suggest also can the Court set new plea deadlines as well?

10 THE COURT: I don't typically do that, but I'm always
11 willing to try something new. What did you have in mind?

12 MR. SHEPHERD: Well, you know, if the Court doesn't
13 have a requirement of a plea deadline, then we're fine with
14 that. I guess I thought the Court did require a plea deadline.

15 THE COURT: Well, I mean, if I could realistically
16 impose one, I would. But, you know, if the week before the
17 trial somebody wants to plead, I've never made somebody go to
18 trial who wanted to plead. But I assume you're all familiar
19 with that, right?

20 MR. SHEPHERD: Yes, Your Honor.

21 THE COURT: All right. Anything else we need to talk
22 about?

23 MS. MORENO: Your Honor, this is Linda Moreno. I just
24 had a question. Does the Court -- will the Court allow a jury
25 questionnaire? I'm speaking only on the 2015 case. Does the

1 Court want briefing in that to -- what's to be our expectation
2 in that regard?

3 THE COURT: You know, I'm in an MDL series of trials
4 where we're using jury questionnaires. The primary reason I've
5 used them in the past is when we have a long trial because a
6 lot of people can't sit for five weeks. The other would be a
7 high profile case. I guess I would be interested in your views
8 if there's been enough pretrial publicity that we can expect a
9 lot of people walking in the courtroom to be either close to
10 being automatically disqualified or something akin to that. If
11 that's the case I would rather do questionnaires, and we would
12 use those to winnow down people coming in that we would not
13 assume would be close to being disqualified before they walked
14 into the courthouse.

15 MS. MORENO: I would agree with that, Your Honor. In
16 addition to the pretrial publicity, which I certainly expect in
17 these cases and they'll bleed into each other, unfortunately
18 for Mr. Salim, I also expect that juror questionnaires are
19 often used in these national security types of related cases to
20 focus on issues of prejudice resulting from, you know, the
21 religion, the culture, et cetera. And, as I'm sure you know,
22 many district judges around the United States use them in these
23 cases. And, as I said, I can certainly provide briefing if the
24 Court needs that, but it's our expectation there will be pretty
25 easy cause issues raised in the questionnaires from the

1 pretrial publicity and just personal issues of prejudice and et
2 cetera.

3 THE COURT: Well, is there anybody on the call who
4 would be opposed to jury questionnaires? I wouldn't think
5 there would be, but just in case.

6 MR. SHEPHERD: Not the government, Your Honor. We're
7 fine. We would join in that.

8 THE COURT: Why don't we do this: We can do this
9 relatively early. Why don't we set a date in a few weeks where
10 you all submit to me proposed questions to be on the jury
11 questionnaires, and then we can set this even for -- it would
12 be better if we had an in-person situation, but you're all
13 spread out. But we can discuss -- I will tell you one thing
14 I've noticed with lawyers and questionnaires is I don't want to
15 ask 40 questions. And the reason for that is simple. It's
16 going to pique a lot of interest, it may encourage people to go
17 and do some research. We don't want to do that. Plus, it
18 won't be helpful. This is not in lieu of voir dire. What I'm
19 really look for are people whose time is being wasted and your
20 time will be wasted if you put them in the pool and we should
21 have checked ahead of time and we would have found out that
22 they would be automatically disqualified. That's the group
23 we're looking for; people who can't serve that long, people who
24 know about the case, people who have really strong views about
25 matters that might come up in this case. So I would keep it

1 relatively simple if you want to be successful with this.

2 Effective --

3 MS. MORENO: I appreciate the Court's direction.

4 THE COURT: -- but simple.

5 MR. DURKIN: Judge, in our motion to continue we had
6 asked to extend the time for the filing of pretrial motions in
7 the '16 case. The government had no objection to that. Can we
8 get a date by which to file?

9 THE COURT: What are you suggesting?

10 MR. DURKIN: Maybe 30 days?

11 THE COURT: All right. Does the government have any
12 problem with that?

13 MR. SHEPHERD: No, Your Honor.

14 THE COURT: All right. Then that's what it will be.

15 MR. DURKIN: And I have one other issue, Judge, and I
16 don't want to -- I don't want you to think I'm trying to
17 re-litigate the order. But so that I can advise my client and
18 his family, if -- are you ordering me to sign the affirmations?
19 Or if I don't sign them, would you not permit me to proceed in
20 the case? In other words --

21 THE COURT: I'm not going to answer a hypothetical.
22 I'm not going to make an off-the-cuff decision. The order says
23 what it says. You can notify me of what your choice is and
24 that could beget a briefing or something, but I'm not going to
25 do this in the abstract. And, I mean, you know, if you need to

1 move quickly on this, I understand. I would encourage that.
2 But I think I owe you an opinion, not something off the cuff.

3 MR. DURKIN: No, no, no. And I'm not trying to force
4 that. It's just -- okay. I'll do what I -- I will get
5 something to you right away.

6 THE COURT: All right. Very good. Anything else?

7 MR. DURKIN: Nope.

8 MR. SHEPHERD: Your Honor, just so I'm clear on the
9 '16 case, the defense motions are due in 30 days, and then the
10 government has how many days to respond?

11 THE COURT: What do you think, 15?

12 MR. SHEPHERD: That's fine, Your Honor.

13 THE COURT: We're supposed to divide by seven these
14 days. How does that sound?

15 MR. SHEPHERD: That works.

16 MR. DURKIN: What date would that be, Judge? 30 days
17 from today is?

18 THE COURT: Well, today is the 6th so that would be
19 the 5th of February, and the 19th would be the memorandum in
20 opposition.

21 MR. DURKIN: Could -- that's a Sunday, Judge. Could
22 we have until the 6th?

23 THE COURT: Yes.

24 MR. DURKIN: Thank you. February 6.

25 THE COURT: Right.

1 MR. DURKIN: Okay. Sounds good. Thank you.

2 THE COURT: All right. Thank you very much. Take
3 care.

4 (Proceedings concluded at 4:00 p.m..)

5 - - -

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, Darla J. Coulter, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Edmund A. Sargus, Chief Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Darla J. Coulter
Darla J. Coulter, RMR, CRR
Official Federal Court Reporter

January 18, 2017